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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EZEQUIEL GARCIA,

Defendant and Appellant.

B221396

(Los Angeles County  
Super. Ct. No. NA 048955)

APPEAL from a judgment of the Superior Court of Los Angeles County.

John David Lord, Judge. Reversed and remanded.

Deborah L. Hawkins, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M.  
Roadarmel, Jr. and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ezequiel Garcia timely appealed from his conviction for first degree murder. The jury found true firearm and gang allegations. The court sentenced defendant to a total of 50 years to life. Among other issues, defendant contends the court erred in denying his motion to bifurcate the gang enhancement and the evidence was insufficient to support the gang enhancement and the murder charge. We reverse and remand.

## **FACTUAL BACKGROUND**

### ***I. Prosecution Case***

On Saturday night, June 2, 2001, Susanna Garcia and her boyfriend Ricardo Robledo went to a party. When the party was over, Susanna left with Robledo, who was over six feet tall and a big man. Robledo walked out in front of Susanna and appeared to be upset. Robledo was throwing his hands in the air, and it appeared like trouble to Susanna. Susanna pushed Robledo toward her car, and he got into the front seat. Susanna waited by her car. Bottles and cans were being thrown at her car. Susanna thought someone wanted to fight Robledo. Robledo got out of the car. Susanna tried to hold him back, but he threw her down and told her to stay down and “get out of . . . his business.” After Robledo walked off, Susanna heard a gunshot. Susanna saw Robledo on the ground surrounded by young adults from the party. Susanna did not see who shot Robledo.

Rene Manzano<sup>1</sup> was at the same party. Rene knew appellant prior to the party from around the neighborhood. The night of the party, Rene saw appellant pull out a shotgun and shoot Robledo. Robledo did not do anything before he was shot. Rene, Salvador Diaz and Manuel Castillo took Robledo to the hospital. On June 6, Rene identified appellant in a six-pack photo lineup as the shooter. Robledo died from a gunshot wound to the chest.

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<sup>1</sup> Rene’s preliminary hearing testimony was read to the jury after the court determined he was unavailable as a witness and the People had exercised due diligence in attempting to locate him.

Detective Paula Chavez, who gave Rene the six-pack photo lineup, made extensive efforts to locate appellant afterwards, but was unsuccessful. Appellant was arrested at LAX on September 28, 2007.

Appellant lived with his mother until June 3, 2001, when he left her house and never returned. Appellant's mother did not see or hear from her son again until May 20, 2008. Detective Ana Pinell spoke with appellant's mother on February 9, 2006. Appellant's mother told Pinell that she had not seen appellant since the day of the murder when he told her he had to leave because he had killed somebody.<sup>2</sup>

Officer Mark Maldonado testified as an expert on the Eastside Wilmas Street Gang. The party took place in a neutral zone. Appellant had admitted to Maldonado that he was a member of the Eastside Wilmas gang. In Maldonado's opinion, appellant was an Eastside Wilmas gang member and had been since the age of 14. Based on a hypothetical set of facts, Maldonado opined the shooting in this case was for the benefit of the Eastside Wilmas gang. Maldonado explained that after Robledo got out of the car, appellant could not back down from the challenge without losing respect. The murder would benefit his gang's reputation for violence and promote its notoriety.

## ***II. Defense Case***

Manuel Castillo went to the party with Salvado Diaz. Castillo was in the backyard with Diaz when he heard a sound that he thought might be fireworks. When Castillo went to the front of the house, he saw a crowd and a body in the street. Castillo could not remember if Rene was in the backyard with them when they heard the sound.

Rene's older brother Ramiro also attended the party. Ramiro saw gang members at the party but did not recall whether they were Eastside Wilmas; people went to the microphone at times and made comments about Eastside Wilmas. Ramiro, Rene, Diaz and Castillo were in the backyard of the house when they heard the shot. The men then

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<sup>2</sup> In court, appellant's mother denied making that statement to police.

went to the front yard where they found Robledo lying in the street. Ramiro said Rene's reputation for telling the truth was "bad."

Diaz<sup>3</sup> testified that he was with Rene and Ramiro at the end of the party. After the announcement the party was over, Diaz heard a loud noise, and he and everyone around him ducked. Ramiro was right next to Diaz, and Rene was just ahead of them. Diaz said that when they heard the gunshot, the three men were in the backyard, but not behind the house.

The parties stipulated that Castillo, Diaz and Rene were interviewed by Officer Fuentes at the hospital the morning after the shooting. All three told Fuentes that they were in the backyard when they heard the gunshot and came around to the front to find Robledo in the middle of the street with a gunshot wound to the chest. Detective Alonzo Canada also interviewed Rene at the hospital on the night of the shooting. Rene told Canada that he was in the backyard of the house when he heard something that sounded liked an M-80 and he panicked and ducked down.

Detective Chavez spoke with a Genaro Felix on June 3, 2001. Felix was five feet nine inches tall and weighed about 160 pounds. As a result of that interview, Juan Carlos Almanza was arrested for the murder of Robledo. At trial, Genaro Felix denied being at the party on June 2 and further denied identifying Almanza as the shooter on June 3. In February 2001, Felix had been the victim of identity theft. In 2001, Felix was five feet four inches tall and weighed 113 pounds. Almanza, who was not a gang member, was released after being in custody for 12 days.

Appellant's fingerprints did not match those collected at the scene. No shell casings or firearms were collected at the scene.

### ***III. Rebuttal***

Almanza was with his parents at a family party the entire evening on June 2. A search of his residence yielded no firearms or gang paraphernalia.

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<sup>3</sup> After the court determined that Diaz was also not available as a witness, his preliminary hearing testimony was read to the jury.

## **DISCUSSION**

Appellant contends the court should have removed Juror No. 3257 for cause or granted him an additional peremptory challenge to remove that juror, the court should have recused itself on its own motion based on its alleged bias against street gangs, the preliminary hearing testimony of Rene Manzano was inadmissible because the state failed to show due diligence in locating him, admission of evidence suggesting that Ricardo Robledo was not a gang member was prejudicial, the court erred when it denied his motion to bifurcate the gang enhancement, the evidence was insufficient to prove the gang allegation and the murder charge, and he was entitled to one additional day of custody credit.<sup>4</sup> Appellant requests that his convictions be set aside based on insufficient evidence or, in the alternative, he be granted a new trial. As we conclude the admission of the gang evidence was prejudicial, we need not address all these issues.

### ***I. Motion to Bifurcate***

Appellant contends the court erred when it denied his motion to bifurcate the gang enhancement, which violated his right to a fair trial, because the gang evidence was irrelevant to the murder charge and threatened to sway the jury to convict him regardless of his actual guilt. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [The court recognized “some of the gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant’s actual guilt.”].)

#### ***A. Background***

The information charged the murder of Robledo was committed for the benefit of, at the direction of, or in association with a criminal street gang. In a pretrial motion, appellant argued failing to bifurcate would be highly prejudicial to him as the jury would

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<sup>4</sup> Although we do not address these issues, on retrial, in light of the analysis in this opinion, the court should limit or eliminate its descriptions of gangs during voir dire and admission, over objection, of any testimony by the expert that he had no information the victim was a gang member.

be inclined to convict him based on evidence he was a gang member and the only evidence supporting motive was his gang membership. The prosecutor opposed the motion for several reasons, including the fact Rene had identified appellant by his gang moniker and the expert's testimony was central to the question of motive. The court denied the motion, but gave a limiting instruction (CALCRIM No. 1403). The court also denied appellant's motion for a new trial, which included claims the court erred in not bifurcating the gang enhancement and in allowing the expert to testify on gang issues.

### ***B. Gang Evidence***

A court's ruling denying a motion for bifurcation is reviewed for abuse of discretion. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1048.) The proponent of bifurcation must "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Id.* at p. 1051.) After noting that gang evidence is often relevant to the charged offense to help prove motive, among other things, the court reasoned: "To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled and bifurcation would not be necessary." (*Id.* at pp. 1049-1050.)

Citing *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168, respondent contends the gang evidence was relevant to motive as gang enmity, or appellant's perception of it, was the sole motive for the senseless killing and the expert helped the jury understand the prosecutor's theory. In addition, respondent asserts appellant has not demonstrated such gross unfairness so as to show he was deprived of due process. In *Samaniego*, there was evidence the defendants were all members of the same gang, frequently associated with each other, and working together had previously shot and killed a "tweaker" who had disrespected their gang, and the motive for another murder was to benefit the gang by taxing the victim for selling drugs in the gang's territory. (*Id.* at p. 1178.)

"Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the

offense charged -- and thus should be carefully scrutinized by trial courts -- such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) The California Supreme Court has “condemned the introduction of such evidence if it is only tangentially relevant to the charged offenses.” (Italics deleted.) (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.)

However, at the time appellant made his motion to bifurcate, a gang enhancement was charged. The court denied the motion on the basis of the People’s representation the case involved motive. Previously, at the time the court heard appellant’s Penal Code section 995 motion, it indicated it needed to hear the facts. Thus, we cannot conclude the court abused its discretion when it denied the motion. Rather the issue before us is whether the admission of the gang evidence was prejudicial.

## ***II. Substantial Evidence***

Appellant contends the evidence was insufficient to prove the gang enhancement or the murder charge. Citing *Albarran* and other cases, appellant asserts the expert’s opinion here that there was a gang motive for the killing was irrelevant, inadmissible and highly prejudicial as the record was devoid of any evidence (other than appellant’s gang membership) connecting the crime to a gang motive. In *Albarran*, the trial court granted the defendant’s new trial motion on the grounds the gang evidence was insufficient to support the gang allegations, but denied the motion as to the underlying charges. (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 225-226.) This court concluded that the trial court should also have granted a new trial on the underlying charges. (*Id.* at pp. 227-228, 232.)

In *Albarran*, the expert opined the shooting was gang related because it occurred in a gang area, at a party where gang members often committed crimes, and more than one shooter was involved. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 221.) In addition, although the gang expert testified the shooting was for the benefit of the gang as it was done to gain respect, the expert admitted he had no knowledge of any direct

evidence such as gang signs, announcements or graffiti that linked the defendant or his gang to the charged offense. (*Id.* at pp. 219-220.) This court concluded there was no evidence the shooting was done with the intent to gain respect, noting there was no evidence the gang evidence had any bearing on the underlying charges even if it had some relevance to motive as the motive was not apparent from the circumstances and the only evidence to support the motive was the defendant's gang affiliation. (*Id.* at p. 227; accord *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661-662 [nothing in the circumstances of the charged carjackings supported the gang expert's opinion the crimes were gang related]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 [there were no facts from which the expert could discern whether the defendants were acting on their own or on behalf of their gang]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [expert's opinion about why a minor defendant possessed a knife not supported by any gang evidence].)

The only evidence to support a gang motive in the instant case was appellant's gang membership. Although some gang members were at the party, the location was in neutral territory. There was no testimony that prior to the shooting, appellant announced his presence or purpose, that there were any gang threats, that the ubiquitous "where are you from" challenge was issued, or that appellant's gang often committed crimes at parties. There was no evidence any gang member had bragged about the murder afterwards. There was no indication that the killing was in retaliation for a prior killing of a member of appellant's gang or that gang graffiti was present in the area. The only basis for the expert's opinion that there was a gang motive was his statement that appellant could not back down once Robledo challenged him. However, there was no evidence that Robledo challenged appellant or was a gang member; the shooting appears to have been instantaneous with Robledo's getting out of the car. Without some factual evidence to support the expert's opinion, it would come perilously close to holding all crimes committed by a gang member are for the benefit of the gang, which is not the law.

Only after the trial was it possible to say for certain the expert's opinion was not supported by substantial evidence. (See *People v. Hughes* (2002) 27 Cal.4th 287, 370; *People v. Holt* (1997) 15 Cal.4th 619, 667.) Thus, we reverse the conviction on the gang enhancement. (See *People v. Ochoa*, *supra*, 179 Cal.App.4th at p. 665.)

Appellant's contention that his murder conviction is not supported by substantial evidence is based on arguments about the credibility of the evidence, i.e., there was evidence Rene was not in a position to observe the shooting, it was not likely appellant's mother would "rat" him out to the police, etc.; his argument is unpersuasive as credibility is an issue for the trier of fact. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Rene identified appellant as the shooter, appellant told his mother he had to leave because he had killed someone and he fled the state for several years.

“‘[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair.’” (Italics deleted.) (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 229.) “To prove a deprivation of federal due process rights, [appellant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. ‘Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must “be of such quality as necessarily prevents a fair trial.” Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.’ ‘The dispositive issue is . . . whether the trial court committed an error which rendered the trial “so ‘arbitrary and fundamentally unfair’ that it violated federal due process.”’” (Citations omitted.) (*Id.* at pp. 229-230.)

Here, the evidence was insufficient to show that the crime was gang-related rather than a personal crime. Nonetheless, the prosecutor argued that this case was an example of how gangs operate by ripping families apart and causing one brother to call his younger brother a liar. The prosecutor told the jury that the gang culture was the motive for the killing as a gang member expected respect, i.e., that people would be afraid of him, and the gang earned respect by committing violent crimes.

Thus, while noted by the dissent, there was no incendiary gang evidence of the type present in *Albarran*, the prosecutor's argument was centered on the fact this was a gang murder which benefitted the Eastside Wilmas. The prosecutor asserted Maldonado's (the gang expert) testimony was important because it explained the motive behind the killing. Maldonado opined that when an individual got out of the car, walked up to appellant and challenged him, appellant could not back down because "backing down would be a loss of respect" and respect was "everything in the gang world." Manzano, however, testified that the shooting took place as soon as Robledo stepped out of the car; and that Robledo did nothing before he was shot. Even the fact that Robledo got out of the car after bottles and cans had been thrown at the car, provides no evidence of a challenge or confrontation from which appellant could not back down – there was no evidence that appellant had any connection to the cans and bottles. The only evidence was that appellant shot Robledo. Without any factual support for the expert's opinion, the gang evidence was prejudicial, and the prosecutor's argument about motive was unsupported. Thus, the expert's opinion that appellant could not back down without losing respect infected the murder charge as well as the gang allegation.

Thus, similar to *Albarran*, we conclude admission of the gang evidence also infected appellant's murder conviction as it had limited probative value and created a substantial danger of undue prejudice. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) Accordingly, as in *Albarran*, this case "presents one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*People v. Albarran, supra*, 149 Cal.App.4th at p. 232.) Accordingly, appellant is entitled to a new trial on the murder charge.

### **DISPOSITION**

The judgment is reversed and the matter is remanded to the superior court for further proceedings. On remand, the superior court is directed to vacate its order denying

appellant's motion for a new trial and to enter an order granting him a new trial on the murder charge.

**WOODS, J.**

**I concur:**

**ZELON, J.**

PERLUSS, P.J., Dissenting.

I respectfully dissent.

The majority holds the trial court did not abuse its discretion when it denied Ezequiel Garcia's motion to bifurcate the trial of the gang enhancement allegation based on the People's representation the motive for the charged offense, murder, was gang-related. I agree. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050 (*Hernandez*).) The majority also concludes the evidence at trial was not sufficient to support the jury's finding the murder of Ricardo Robledo had been committed for the benefit of a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1).) I concur in that conclusion, as well. As my colleagues explain, the only evidence to support the specific intent element of the gang enhancement was Garcia's membership in a gang and the expert's opinion that, because he was a gang member, Garcia could not back down once Robledo had challenged him. That is not enough. (See *People v. Albillar* (2010) 51 Cal.4th 47, 60 ["[n]ot every crime committed by gang members is related to a gang"].)

Notably, however, although legally insufficient to support the finding Robledo's murder was gang-related, the majority does not find the gang evidence proffered by the People was improperly admitted at trial: Garcia's gang membership and information about gang culture were relevant not only to the gang enhancement allegation itself but also to shed light on Garcia's behavior leading up to the shooting—that is, his motive—even in the absence of a specific intent to benefit the Eastside Wilmas gang. (See *Hernandez, supra*, 33 Cal.4th at p. 1049 ["[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation . . . can help prove identity, motive, . . . or other issues pertinent to guilt of the charge crime."].)

Nonetheless, my colleagues reverse Garcia's conviction for murder, holding the introduction of this admissible evidence was so prejudicial it deprived Garcia of a fair trial in violation of his constitutional right to due process. I cannot join that conclusion,

which, although generally based on this court’s analysis in *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), fails to recognize the significant difference between the inflammatory gang testimony in that case and the relatively tepid evidence in the case at bar. (See *id.* at p. 229 [““Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must “be of such quality as necessarily prevents a fair trial.””]; see generally *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [“[t]he admission of relevant evidence will not offend due process unless that evidence is so prejudicial as to render the defendant’s trial fundamentally unfair”]; *People v. Partida* (2005) 37 Cal.4th 428, 439 [“the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*.”].)

In *Albarran, supra*, 149 Cal.App.4th 214, like the case at bar, the People’s evidence was insufficient to prove the criminal street gang enhancements. Turning to the impact of that evidence on the trial of the underlying charges, this court emphasized there had been extensive testimony concerning predicate acts by other gang members that were not related to the charged crime or even to the defendant—evidence this court characterized as “extremely and uniquely inflammatory.” (*Id.* at p. 230.) “Certain gang evidence, namely the facts concerning the threat to police officers, the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, had no legitimate purpose in this trial.” (*Ibid.*; cf. *Hernandez, supra*, 33 Cal.4th at p. 1049 [explaining bifurcation of a gang enhancement allegation may be appropriate because of the unduly prejudicial impact of evidence of predicate offenses offered to establish a “pattern of criminal gang activity”].) In particular, this court noted references to the Mexican Mafia “are extremely prejudicial” (*Albarran*, at p. 230, fn. 15), and suggested several other times in the opinion any evidence concerning the Mexican Mafia should have been excluded under Evidence Code section 352. (See, e.g., *id.* at pp. 228 & fn. 11, 230, fn. 14.)

No similar incendiary gang evidence was presented here. Although gang expert Officer Mark Maldonado testified the primary activities of the Eastside Wilmas were homicide, robbery, aggravated assault, vehicle theft and narcotics sales, the two predicate criminal acts he described were unlawful driving or taking of a motor vehicle and simple robbery. In addition, at Garcia's request the trial court instructed the jury with CALCRIM No. 1403, detailing the limited purposes for which the evidence of gang activity had been received and specifically advising the jury, "You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." It is, of course, presumed the jury followed the court's instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury'"]; *People v. Holt* (1997) 15 Cal.4th 619, 662 ["[j]urors are presumed to understand and follow the court's instructions"].)

Whatever minimal impact this evidence of gang activity may have had on the jury, the independent evidence supporting its verdict finding Garcia guilty of murder is compelling. Garcia was identified as the shooter by an eyewitness in a photographic six-pack lineup and again by that witness in court at the preliminary hearing. In addition, the police detective who interviewed Garcia's mother testified she told her Garcia had admitted he had killed someone the day after Robledo's murder and had to leave. Garcia, in fact, left the home he shared with his mother on that day; and she did not see him for the next seven years. In finding Garcia guilty, the jury plainly credited the identification testimony, as well as Garcia's admission to his mother, discounted any purported inconsistencies in the eyewitness's preliminary hearing testimony and disbelieved the defense evidence suggesting the eyewitness had not seen the shooting.

In sum, considering the limited potential prejudicial impact of the gang-related evidence (with its related limiting instruction) against the weight of the evidence of Garcia's guilt on the underlying charge of murder, I cannot conclude the trial was so

arbitrary and fundamentally unfair that it violated Garcia's constitutional right to due process (see *Albarran, supra*, 149 Cal.App.4th at pp. 229-230) or that a gross unfairness has occurred that undermines my confidence in the jury's verdict (*id.* at pp. 239-240 (dis. opn. of Perluss, P. J.)).

PERLUSS, P. J.